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In The
Supreme Court of the United States

October Term, 1983

THE SCHOOL DISTRICT OF
THE CITY OF GRAND RAPIDS, *et al.*,

Petitioners,

v.

PHYLLIS BALL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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* This brief is being submitted by the National Jewish Commission on Law and Public Affairs ("COLPA") and is joined in by the following major national Orthodox Jewish rabbinic, synagogal, educational and social service agencies which represent the broad spectrum of the Orthodox Jewish community in this country:

Agudath Israel of America
National Council of Young Israel
Rabbinical Alliance of America
Rabbinical Council of America
Torah Umesorah, The National Society for Hebrew Day Schools
Union of Orthodox Jewish Congregations of America
Union of Orthodox Rabbis of the United States and Canada

(Footnote continued on next page)

INTEREST OF THE AMICUS CURIAE AND SUMMARY OF ARGUMENT

The National Jewish Commission on Law and Public Affairs ("COLPA") is a voluntary non-profit membership organization of lawyers and social scientists that represents the Orthodox Jewish community on legal issues presented in judicial, legislative and administrative forums. Believing staunchly in the constitutional liberties guaranteed by the First Amendment to the United States Constitution, the Orthodox Jewish community endorses the principle that publicly controlled and operated educational programs that are totally secular in nature should be equally available to students attending religious schools as to those attending public schools. The record in this case establishes that the Grand Rapids School Board implemented the programs under attack in this litigation as a means of providing to private-school students (including those in parochial schools), in a convenient location, the same kinds of supplementary public education that had been made available with tax funds to public school students. The fact that these services are supplied at a site that is convenient to the students—*i.e.*, in the same building where they receive their religious training and their required secular courses—should not invalidate programs which are otherwise operated and controlled by secular governmental officials and which have been shown, in actual operation over six years, to present no real threat of religious indoctrination.

According to the record made below, no students at Jewish religious schools are benefited by the programs at issue in this particular case. There appear to be no Jewish day schools in the City of Grand Rapids. Nonetheless, the issue of principle—*i.e.*, whether supplementary publicly financed educational programs may be conducted under the control of public-school personnel on the premises of religious schools—is of great importance to the religiously observant Jewish community. If private-school students are denied the benefits of such programs, they are effectively excluded, because of their parents' religious beliefs, from educational benefits offered to the rest of the student population.

In addition, this brief is joined in by the Board of Jewish Education of Greater New York, the educational service agency of the Federation of Jewish Philanthropies of New York.

ARGUMENT

This Court recognized recently in *Marsh v. Chambers*, 103 S. Ct. 3330, 3337 (1983), that in drawing constitutional lines between what is permissible and what is prohibited under the Religion Clause of the First Amendment it is essential "to distinguish between real threat and mere shadow." The decision of the court of appeals in this case elevates the shadow of speculative possibilities over the reality of actual experience. On the basis of an apparently inaccurate judicial assumption as to the identities of the teachers who are retained to teach shared-time classes (see Petition for Certiorari, pp. 6-7) and on the basis of sheer judicial speculation as to what such teachers are likely to do, the court of appeals has barred more than 11,000 children in Grand Rapids from receiving secular educational benefits that would enable them to be more useful and productive American citizens. It is undisputed that the evidentiary record of six years' experience with the Grand Rapids program has produced not a single instance of religious indoctrination during the Shared Time and Community Development prog-

rams conducted on premises leased from nonpublic schools (Pet. App. 35a). By disqualifying nonpublic school children from these programs simply because the classes are held in buildings which are also used for religious teaching, the court below crossed the line from neutrality which "neither advance[s] nor impede[s] religious activity" (*Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976)) to "hostility" against students whose parents have elected to provide them with a religious education at the elementary and secondary-school level (*Lynch v. Donnelly*, 52 U.S.L.W. 4317, 4318 (1984); *McDaniel v. Paty*, 435 U.S. 618, 636 (1978) (Brennan, J.)).

The unfairness of disqualifying students at religious schools from these programs becomes manifest if the nature and history of the programs is considered. The record establishes that well before 1976 the Grand Rapids public school authorities determined that the core curriculum at public schools should be supplemented with remedial and enrichment programs designed to help gifted, as well as disadvantaged, students. The State of Michigan offered significant financial inducements for initiation of such programs, presumably because the State and its citizenry are benefited if all schoolchildren receive a more rounded education than bare reading, writing, arithmetic, science and history.

All schools—public and private—continued after 1976 to provide the basic minimum requirements mandated by State law. Private schools were required to cover the costs of such a core curriculum entirely from their own resources. Beginning with 1976, however, the programs at issue in this case were conducted, *under the control and supervision of the public-school*

authorities, in rooms leased for public-school purposes from various private schools in Grand Rapids. The record further established that the Grand Rapids School Board arrived at the decision to utilize the private-school facilities for these enrichment programs not in order to further the religious goals of parochial schools but because the only alternative—utilizing public-school rooms and transporting the private-school students to the public schools for these sessions—would have been practically and financially impossible. Specifically, the Board concluded that:

> (1) the public school facilities had inadequate space for these programs;
>
> (2) the costs of transporting the private-school students to public school buildings would have been prohibitive; and
>
> (3) the disruption caused by transportation of the students would have harmed the educational effort.

In light of these findings, which were based entirely on permissible non-religious considerations, the only practical choices the Grand Rapids School Board had were either to rent private-school facilities or to exclude private-school children from these programs. The court of appeals has now ruled that the first alternative—the one the School Board chose—was constitutionally impermissible. The consequence is that the Constitution has been read to deny more than 11,000 children in Grand Rapids—and potentially hundreds of thousands across the country—the benefit of remedial and enrichment mathematics and reading courses, classes in art, music, and physical education, and after-school classes in arts and crafts, model-building and other leisure-time hobbies and activities. These are all classes that had not previously been offered in the non-public schools, are not required for promotion or

graduation, and have been made available for a number of years to children attending public schools in Grand Rapids.

We refuse to believe that the First Amendment to the United States Constitution, which was designed as a bulwark of religious liberty and a means of guaranteeing religious freedom in this Nation, prohibits public school authorities from utilizing the only effective means of delivering remedial and enrichment classes to the thousands of children who are receiving combined secular and religious educations because their parents have deep and abiding religious convictions. A Jewish parent who believes that it is an essential principle of his or her religious faith to teach the principles of Judaism diligently to his or her children (*Deuteronomy* VI, 7) is not only asked, under this constitutional doctrine, to pay for the child's religious instruction and for the core secular program that is required for promotion and graduation under State law, but is also asked to relinquish all practical access to supplemental programs that public-school authorities are prepared to provide, *under their exclusive guidance and control*, on the premises of a private school. The Constitution does not, we submit, require this "cruel choice." See *Braunfeld v. Brown*, 366 U.S. 599, 616 (1961) (Stewart, J., dissenting); *see also Widmar v. Vincent*, 454 U.S. 263 (1981). The result of the ruling below is, at the least, the kind of "callous indifference" to religious believers which this Court has said "was never intended by the Establishment Clause." *Lynch v. Donnelly*, 52 U.S.L.W. 4317, 4318 (1984).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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